LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 27 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 878

SERTA ASSOCIATES, INC., *Appellant*

v.

UNITED STATES OF AMERICA

On Appeal From United States District Court for the Northern District of Illinois

JURISDICTIONAL STATEMENT

SIGMUND TIMBERG
815 15th Street, N. W.
Washington, D. C. 20005

ALAN J. ALTHEIMER
LIONEL G. GROSS
DAVID V. KAHN
ROGER B. HARRIS
One North LaSalle Street
Chicago, Illinois 60602

Attorneys for Serta Associates, Inc.

December, 1968

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
1. Formation and Current Operation of the Serta Joint Venture	3
2. The Adoption and Maintenance by Serta of Exclusive Territories for Its Licensees	6
3. The Competitive Structure of the Bedding Industry	7
4. The Issues in the Case	9
5. The District Court's Judgment	11
The Questions Are Substantial	11
A. The Grant of Exclusive Territories to Serta's Licensees and Other Franchisees Similarly Situated Is Basic to the Continuing Development of Franchising and the Maintenance of Small Business	11
B. The Grant of Exclusive Territories to Serta's Licensees Is Legal Under the Sherman Act as Ancillary to the Lawful Purpose of the Serta Joint Venture	14
C. The Court Below Erred in Enjoining Exclusive Territories for Products Bearing the Common Trademarks of the Serta Joint Venture (Sec. IV(D) of the Final Judgment)	19
Conclusion	23

		Page
Appendix A	Memorandum Opinion of the District Court	1a
Appendix B	Final Judgment of the District Court	14a
Appendix C	Sales Below Suggested Prices at the Retail Level	19a

CITATIONS

CASES:

Esso, Inc. v. *Standard Oil Co.*, 98 F. 2d 1 15
Standard Oil Co. (Kentucky) v. *Humble Oil & Refining Co.*, 363 F. 2d 945, *cert. denied*, 385 U.S. 1007 15
Standard Oil Co. v. *Standard Oil Co.*, 252 F. 2d 65 15
Standard Oil Co. v. *United States*, 221 U.S. 1 14
Standard Oil Co. v. *United States*, 337 U.S. 293 13
Susser v. *Carvel Corp.*, 206 F. Supp. 636, *aff'd*, 332 F. 2d 505, *cert. granted*, 379 U.S. 885, *cert. dismissed as improvidently granted*, 381 U.S. 125 ... 12
United States v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, *aff'd*, 175 U.S. 211 15
United States v. *Aluminum Co. of America*, 148 F. 2d 416 13
United States v. *Arnold, Schwinn & Co.*, 388 U.S. 365.. 18
United States v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 .....13, 20, 21
United States v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387, *modified and affirmed*, 321 U.S. 707 ..15, 16
United States v. *Columbia Pictures Corp.*, 189 F. Supp. 153 .....15, 16
United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 19
United States v. *Sealy, Inc.*, 388 U.S. 350 .....2, 17, 19, 20
United States v. *Von's Grocery Co.*, 384 U.S. 270 13
White Motor Co. v. *United States*, 372 U.S. 253 .....2, 13

STATUTES:

Expediting Act of February 11, 1903, 15 U.S.C. § 29 .. 2
Sherman Act, Section 1, 15 U.S.C. § 1 9
Miller-Tydings Act, 15 U.S.C. § 1 .....20, 21

MISCELLANEOUS: Page

Hearings on "Distribution Problems Affecting Small Business" before the Senate Judiciary Subcommittee on Antitrust and Monopoly, 89th Cong., 1st Sess. 12, 13

Hearings on "Distribution Problems Affecting Small Business" before the Senate Judiciary Subcommittee on Antitrust and Monopoly, 89th Cong., 2d Sess. 8, 9

Hearings on S. 1396 before the Senate Judiciary Subcommittee on Patents, Trademarks and Copyrights, 87th Cong., 1st Sess. 8

Leading National Advertisers, Inc., *National Advertising Investments* 6

Lewis & Hancock, The Franchise System of Distribution monograph prepared for the Small Business Administration (Univ. of Minnesota, 1963) 12

Regardie and Brooks, Cost and Profit Survey for National Association of Bedding Manufacturers (1964) 4

Turner, Panel Discussion on *Orderly Marketing, Franchising and Trademark Licensing,* 1968 N. Y. State Bar Ass'n, Antitrust Symposium 31, 35, 43, 44 18

Wilson, *Some Problems Relative to Franchising Arrangements,* 11 Antitrust Bulletin 473 (1966) 13

Zeidman, *The Growth and Importance of Franchising —Its Impact on Small Business,* 12 Antitrust Bulletin 1191 (1967) 18

Zimmerman, *Distribution Restrictions After Sealy and Schwinn,* 12 Antitrust Bulletin 1181 (1967) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

SERTA ASSOCIATES, INC., *Appellant*

v.

UNITED STATES OF AMERICA

On Appeal From United States District Court for the Northern District of Illinois

---

JURISDICTIONAL STATEMENT

OPINION BELOW

The District Court's opinion, which constitutes its findings and conclusions (App. A), is unofficially reported in 1968 C. C. H. Trade Cases, Para. 72,543 (1968), and the final judgment (App. B) in 1968 C. C. H. Trade Cases, Para. 72,583 (1968).

JURISDICTION

The judgment of the District Court was entered on September 30, 1968. The notice of appeal was filed in the United States District Court for the Northern District of Illinois on October 3, 1968. The jurisdiction of this Court is conferred by the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. § 29. *White Motor Co.* v. *United States*, 372 U. S. 253 (1963); *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967).

QUESTIONS PRESENTED

The questions presented are:

1. Whether a group of small, regionally based bedding manufacturers who are—

(a) involved in a lawful joint venture for the promotion of their product by national advertising;

(b) licensed by the joint venture under common trademarks that are owned and nationally promoted by the joint venture and locally promoted by the individual licensees; and

(c) left free to sell their product anywhere they please under trademarks other than those owned by the joint venture—

may, consistently with Section 1 of the Sherman Act and as ancillary to the joint venture, be given the exclusive right in the common trademarks in designated territories.

2. Whether, where the lawful joint venture described in Question 1 was found guilty of an aggregation of trade restraints, involving price-fixing and ex-

clusive territories, for products bearing the common trademarks owned by the joint venture, the trial court erred in issuing a permanent injunction against such exclusive territories.

STATEMENT OF THE CASE*

1. Formation and Current Operation of the Serta Joint Venture

Appellant Serta Associates, Inc. (hereinafter called "Serta" or "the joint venture") is a trademark licensing and national advertising and promotion organization, the stock of which is held by 36 U. S. and 4 Canadian regionally-based bedding manufacturers (hereinafter called the "licensees"), who are also licensees under trademarks owned by Serta and the beneficiaries of Serta's advertising and promotional activities.

Serta's stockholder-licensees are small business. In 1965, out of 31 Serta licensees for which such figures were available, 2 were in the 10-19 employee classification; 13, in the 20-49 employee category; 9, in the 50-99 employee class; 6, in the 100-199 employee group; and one had 275 employees. In 1959, the year before the Complaint was filed, the volume of Serta sales by

---

* For reasons which will be set forth more fully later, (see page 10, below, Serta was precluded from presenting evidence in the District Court relating to the functioning of the joint venture, the relationship between the joint venture and the Serta licensees, and the competitive condition of the bedding industry, beyond the Robinson deposition (see pp. 4-5, 7, below), some brief testimony by a retired general manager of Serta and a few statistical exhibits relating to advertising expenditures and to national sales volume. Accordingly, most of the facts set forth in this Statement are not based on the record of this case, but are derived from accredited business and statistical sources or would have been included in the offer of proof that Serta was originally assured it could make and was later precluded from making.

Serta's present licensees ranged from a low of $191,542 to a high of $2,757,934; 11 licensees had less than $500,000 of Serta sales and 21, less than $1,000,000 (DX 40).[1]

In 1964, a reliable industry source reported that the Serta licensees' percentage of profit to sales amounted to 3.23 percent, as compared with an industry-wide average of 3.71%.[2] Applying this Serta profit ratio to the above indicated 1959 sales, the Serta licensees' profits that year, before taxes, would have ranged from about $6,200 to about $90,000.

The purpose for which the Serta joint venture was organized in 1931 is well set forth in the deposition of Dr. Webster Robinson, a professor of business administration at the University of California (Robinson dep. 4). On the basis of a field investigation, Professor Robinson came to the conclusion in 1928 that the Simmons Company was going to preempt the national bedding market, primarily because of its intensive campaign of advertising its trademarked mattress ("Beauty Rest") in nationally circulated media (Robinson dep. 13-15, 20, 23, 25, 30; DX 100). His program for counteracting Simmons' domination of the market, and its ability to achieve national distribution of the "Beauty Rest" mattress through plants and ware-

---

[1] "DX —" refers to defendant's exhibits and "GX —" to Government exhibits offered or admitted in evidence at the trial. "Tr. —" refers to the transcript of the trial. "Item —" refers to the item number assigned by the clerk to documents other than transcripts and exhibits.

[2] Cost and Profit Survey compiled by Regardie and Brooks for the National Association of Bedding Manufacturers. Profit-sales ratios did not vary appreciably between 1959 and 1964.

houses strategically located throughout the United States, was to form a second bedding company with sufficient funds to embark on a similar national advertising campaign and with a similar capacity to achieve national distribution (Robinson dep. 23, 35). Accordingly, he journeyed across the United States interviewing bedding manufacturers with a view to persuading them to merge and form a national bedding company (Robinson dep. 36-37). By 1929, plans for such a company were completed and the stock issue for the merged company was placed with Goldman, Sachs & Company (Robinson dep. 39-43). However, prior to the issuance of the stock, the stock market crashed and the merger plan was abandoned (Robinson dep. 44-47).

Serta (originally known as Guardian Knight, Inc.) was formed in 1931, with the participation of some of the bedding manufacturers who had been involved in the abandoned merger (Robinson dep. 47-49; DX 160, 170). Instead of a merged corporation in which the individual identity of the merging companies would be lost, the organizers of Serta decided to form a corporation (in which each bedding manufacturer would hold stock) that would own common trademarks, license its stockholders to manufacture bedding under those trademarks, and promote the sale of such trademarked bedding by national advertising.

The purpose of the Serta joint venture, at the time the Complaint was filed and currently, remains the same as it was in 1931—to enable small bedding manufacturers, who lack the financial and technical resources to engage individually in national advertising, to do so through the joint venture and thereby to compete with Simmons and other "national brand" companies

with nationwide advertising coverage.[3] Serta itself does not manufacture or sell bedding; these operations remain under the control of the individual licensees, who retain their respective trade names.

Serta is financed by fees paid to it by its licensees (Tr. 2418-2423). The individual licensee's investment in fees paid to Serta is substantial. The total amount of fees paid to Serta over the years by its present U. S. licensees exceeds $17,000,000 (DX 10).

In addition to the payments made by the licensees to Serta, the licensees make substantial expenditures in connection with the local advertising of the Serta trademarks in their respective areas. Thus, the total amount spent by the Serta U. S. licensees for such local advertising during the year 1966 was $1,757,703 (DX 63). It is some indication of the importance of advertising in the bedding industry that the amount thus spent on local advertising alone in 1966 exceeds the gross sales, during that year, of all bedding (Serta and non-Serta) of 24 of Serta's 36 U. S. licensees (DX 35, 63).

2. The Adoption and Maintenance by Serta of Exclusive Territories for Its Licensees

At the outset, Serta's licensees were free to sell anywhere in the United States (Stipulation contained in

---

[3] The national magazine advertising placed by the Serta joint venture is completely beyond the financial resources of any individual licensee. In 1966, a one-page four-color advertisement in McCall's Magazine cost $42,840, whereas a newspaper page (approximately twice the size of a magazine page) cost $894 in Austin, Texas, and $2,066 in Memphis, Tennessee. Over the 14-year period, 1952 to 1965, inclusive, Serta's total national advertising expenditure on behalf of its 36 U.S. licensees has amounted to $3,964,467; this may be contrasted with $28,087,412, or seven times as much, by Simmons, the leader in the industry (see "National Advertising Investments," compiled and published by Leading National Advertisers, Inc.).

Order of January 9, 1968, p. 3 [Item 181]). This created no problems because the 11 original licensees had been chosen with a view to their dispersed geographic location (Robinson dep. 50). The licensees, limited by the heavy cost of shipping a bulk item such as mattresses, were unable to sell outside of their natural trade area (Robinson dep. 34-35, 50).

Serta realized that, if it were to survive competitively, it had to enlarge its original membership. Its early efforts to do so proved disappointing. Despite continuous activity, only five new licensees were added during a two-year period (DX 62). Prospective licensees were making it clear that they would be unwilling to contribute the funds needed for advertising the Serta trademarks, if another Serta licensee could freely capitalize on their financial investment and appropriate and dilute the good will which, as independent manufacturers, they desired to build up for themselves.

Accordingly, Serta's Executive Committee, on November 26, 1932, adopted a policy of assigning its licensees exclusive territories for the sale of Serta-trademarked products. During the two-year period immediately following the adoption of the exclusive territorial policy, Serta obtained 13 new licensees (DX 62). The licensees continued, as before, to manufacture and sell non-Serta bedding wherever they wished.

3. The Competitive Structure of the Bedding Industry

A clear indication of the competitive nature of the bedding industry is that the prices at which mattresses are sold by the licensees to their department and furniture store retail outlets vary from licensee to licensee, and are dependent on the active competition each li-

censee encounters within its local market.[4] The Complaint contains no allegation that the prices charged by the licensees were fixed by joint action or violated the Sherman Act, and the Government has conceded that this is not an issue in this case (Transcript of Opening Statements, pp. 64-65).

On the national scene, the 1963 Census places the total value of industry shipments of mattresses and box springs for that year at $430,721,000 (DX-71). For the same year, the total sales by all 36 U. S. Serta licensees of *both* Serta *and* non-Serta merchandise (which latter sales were substantial) amounted to $43,869,311 (DX 32, 63), or about 10% of the total. The sales of the largest Serta licensee, the one in Chicago, amounted to .8% of total national sales and that of the smallest, in Cleveland, to .06% of the national total (DX 32, 63).

In addition to Simmons, originally the only national company in the industry, the Serta licensees compete with several other strong national companies, such as Union Carbide-Englander, Stearns and Foster and Burton-Dixie. In addition to the Serta and Sealy joint ventures, there are other trademark licensing ventures in the bedding industry, comparable in functioning to Serta but smaller in size. Thus in 1965, the total annual sales of the 18 licensees of the Restonic trademark licensing group ranged from approximately $118,000 to $1,300,000, with only 3 licensees having a

[4] Thus, in Philadelphia, Pa., and Augusta, Georgia, the Serta licensees in 1961 and 1965 had about 25 competitors in each of their respective areas (Hearings on S. 1396 before the Senate Judiciary Committee on Patents, Trademarks and Copyrights, 87th Cong., 1st Sess., pp. 42, 46; Hearings on Distribution Problems Affecting Small Business before the Senate Judiciary Subcommittee on Antitrust and Monopoly, 89th Cong., 2nd Sess., Pt. 2, p. 704, 707).

volume of $1,000,000 or over, 4 falling under $250,000 and the remainder ranging from $250,000 to $600,000; only 50% to 60% of this volume represented Restonic trademarked bedding.[5] In addition to the Sealy, Serta, Spring-Air and Restonic trademark licensing ventures, there are at least two other such groups, Bemco and Sylcon, whose aggregate and average sales volumes are smaller than those of Restonic.

4. The Issues in the Case

As stated at the outset of the Trial Court's Opinion (see p. 1a, below), the Complaint in this case

> "alleges that defendant Serta Associates, Inc. and its stockholder-licensees combined and conspired to fix retail prices and allocate exclusive geographical territories in violation of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1."

The Government does not dispute that the Serta licensees are able to sell non-Serta brands free of any territorial restriction. Such sales have been substantial. Thus, in 1959, the non-Serta bedding sales of ten Serta licensees ranged from 45 percent to 77 percent of their total sales; that of thirteen, from 15 percent to 44 percent of their total; and only ten showed non-Serta sales amounting to less than 15 percent of their total (DX 40). Also, as stated earlier (see p. 8, above), the complaint contains no allegation of horizontal price-

---

[5] It may be noted that Restonic, which had entered into a consent decree to avoid the cost of litigation, has tried unsuccessfully to procure the consent of the Justice Department to the vacation of the decree against it and to afford Restonic an opportunity to defend before the District Court. See Hearings on "Distribution Problems Affecting Small Business" before the Senate Judiciary Subcommittee on Antitrust and Monopoly, 89th Cong., 2d Sess., Pt. 2, pp. 714-715.

fixing on the part of the licensees, and the Government concedes that this is not an issue in the pending litigation.

At the inception of the trial, the District Court entered an order providing that the trial be conducted in two stages, the first stage with respect to the price-fixing issue in the case, and the second with respect to the territorial issue (Order of January 9, 1968 [Item 181]). At the price-fixing stage, no evidence would be received concerning the territorial exclusivity provisions of the Serta license agreements.

At the conclusion of its case on the price-fixing issue, Serta stated that it was prepared to make a formal offer of proof relating to the territorial issue. The Court reserved Serta's right to make such an offer, but said that the logical time to make the offer was after the Court had rendered its decision on the price-fixing issue, pointing out that, if that decision were in Serta's favor, the offer of proof would become "a useless gesture" (Tr. 2688-2690).[6]

The Court's opinion, filed August 9, 1968, found in the Government's favor on both the price-fixing and the territorial issues, thereby foreclosing Serta's opportunity to make an offer of proof on territoriality. Thereafter, when Serta for the record filed a formal motion for leave to submit its offer of proof (Items 239, 241), said motion was denied by the Court on October 25, 1968 (Item 242).

---

[6] Government counsel at the time stated that he did not know that we "would have any objection to that. I think we would want to make a counter offer of what we would tend to prove in aggravation there" (Tr. 2688).

5. The District Court's Judgment

On September 30, 1968, the District Court entered a Final Judgment enjoining Serta both from maintaining resale prices and agreeing with its licensees that they sell Serta trademarked products in exclusive territories. Serta has complied meticulously with the detailed provisions of the Final Judgment prohibiting the maintenance of resale prices and related practices (see Sections IV(A), (B) and (C)) and with the provisions of Section V of the Judgment requiring it to obtain the consent of the licensees to be bound by the terms of the Judgment. All 36 U. S. Serta licensees have filed the required consents (Item 250).

The operation of Section IV(D) of the Judgment, which is the subject of this appeal, has been stayed by court order (Items 236, 242, 244). Section IV(D) provides as follows:

> "Defendant and consenting licensees are each enjoined and restrained from maintaining, adhering to, enforcing, or claiming any rights under any combination, contract, agreement, understanding, plan or program between or among themselves or any other manufacturer of Serta products, to limit or restrict any manufacturer in any substantial way to sales of Serta products within a prescribed territory."

THE QUESTIONS ARE SUBSTANTIAL

A. The Grant of Exclusive Territories to Serta's Licensees and Other Franchisees Similarly Situated Is Basic to the Continuing Development of Franchising and the Maintenance of Small Business

The questions raised by this appeal have a significant economic and legal impact not only on the half-billion dollar bedding industry, but also on the whole system of franchising as it has developed in many other in-

dustries, such as milk and bread co-operatives, ice cream, water conditioning systems and carpet and upholstery cleaning services, see Lewis and Hancock, *The Franchise System of Distribution,* a monograph prepared for the Small Business Administration (Univ. of Minnesota, 1963), pp. 10-11. Franchising is particularly important to the maintenance of small business, because it enables persons with limited capital, who would otherwise be simply employees, to take licenses under nationally recognized trademarks and thereby become independent entrepreneurs, see *Susser* v. *Carvel Corp.,* 206 F. Supp. 636, 640 (S. D. N. Y. 1962), *aff'd,* 332 F. 2d 505 (2d Cir. 1962), *cert. granted,* 379 U.S. 885 (1964), *cert. dismissed as improvidently granted,* 381 U.S. 125 (1965).

The necessary interest and financial investment would not be forthcoming from these franchisees and small entrepreneurs (who, like the Serta licensees, are individually unable to exploit the trademarks) unless they were guaranteed an exclusive right to the use of the licensed mark in their respective trade areas. Only by the grant of such exclusivity can the good will that is the chief capital asset of these franchisees (and enables them to compete against large, impersonal national corporations) be preserved from dilution and impairment. For this reason, some form of franchised area protection, similar to that involved in this case, has been quite common in franchise and license arrangements and has for appropriate cases been supported by the heads of the Government antitrust enforcement agencies, see Lewis and Hancock, *supra,* pp. 22-24, and the statements of Small Business Administrator Foley and Federal Trade Commission Chairman Dixon in the Hearings on "Distribution Problems Affecting Small Business" held by the Senate

Judiciary Subcommittee on Antitrust and Monopoly, 89th Cong., 1st Sess., pp. 11-14, 90 *et seq.*

This Court has only recently given expression to its concern over "'the gradual demise of the small business man,'" see *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 276 (1966). As Judge Learned Hand observed in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429 (2d Cir. 1945), one of the fundamental purposes of the antitrust laws has been "to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." Consistently with this small business antitrust objective, the courts should not, unless necessary to prevent antitrust violation, strike down an industry practice which is not in itself illegal and which is important to the development of franchising and consequently to the preservation of small business.

The fact that a legal practice, such as the grant of territorially exclusive trademark rights involved in this case, has been associated with an illegal practice does not justify a permanent injunction against the practice, see *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 728-729 (1944). This is particularly the case where the practice is one that enables small business to compete on a more equal basis and helps stem the trend towards concentration, see *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963); dissenting opinion of Mr. Justice Douglas in *Standard Oil Co.* v. *United States*, 337 U.S. 293, 319 *et seq.* (1949); and the statement of Rufus E. Wilson, Chief, Division of General Trade Restraints, Federal Trade Commission, *Some Problems Relative to Franchising Arrangements*, 11 Antitrust Bulletin 473, 488 (1966).

The crux of the appeal in this case is that Section IV(D) of the Final Judgment in the Court below, by permanently barring Serta from granting exclusive territorial rights to its licensees, deprives them of a legal and useful aid to their competitive functioning and throws the baby out with the contaminated bath water.

B. The Grant of Exclusive Territories to Serta's Licensees Is Legal Under the Sherman Act as Ancillary to the Lawful Purpose of the Serta Joint Venture

In Serta's view, the exclusive territorial trademark rights barred by Section IV(D) of the Final Judgment are legally justified as ancillary to the lawful main purpose of the joint venture. The Serta licensees contribute, both through fees paid to Serta and through their own local advertising (see page 6, above) to a joint venture designed to advertise and promote trademarks with which their individual business good will is closely bound. One cannot, at the same time, expect them to permit that good will to be diluted and impaired by other Serta licensees selling into an area which they have not served or developed and in which they have made no financial contribution. Such an appropriation of business good will is particularly lacking in antitrust justification where the outside licensee is completely free to ship his product into the protected trade area under his own trademarks (see page 9, above) and where prices for the Serta products are governed by the intensive competition that prevails in the market place (see pp. 7-8, above).

The courts have on many occasions upheld the right of the massive oil companies that were created by the decree in *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911), dissolving the Standard Oil Trust, to the ex-

clusive use of common trademarks and trade names, and to the exclusive exploitation of the good will thereof, in designated geographic areas, see *Esso, Inc.* v. *Standard Oil Co.*, 98 F. 2d 1 (8th Cir. 1938); *Standard Oil Co.* v. *Standard Oil Co.*, 252 F. 2d 65 (10th Cir. 1958); *Standard Oil Co. (Kentucky)* v. *Humble Oil & Refining Co.*, 363 F. 2d 945 (5th Cir. 1966), *cert. denied*, 385 U.S. 1007; and the cases cited at 363 F. 2d 947. It would be most anomalous if the small Serta licensees (see pp. 3 to 4, above) were deprived of similar exclusivity with respect to the Serta-owned common marks. Surely, the fact that the large Standard Oil Companies own the common trademarks in their respective areas, whereas the Serta joint venturers, because of their financial inability to promote the trademarks individually, are licensees, cannot, from any functional and antitrust viewpoint, be said to be a meaningful distinction.

The grant of territorial exclusives to the Serta licensees is well within the established confines of the ancillary restraint doctrine laid down by Circuit Judge (later Chief Justice) Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). In *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S.D.N.Y. 1942), *modified and affirmed*, 321 U.S. 707 (1944), the Court upheld an exclusive agreement between Bausch & Lomb and Soft Lite, under which Bausch & Lomb agreed to manufacture eyeglasses exclusively for Soft Lite, and not to compete with Soft Lite in the sale of said eyeglasses, as a reasonable restraint under "the classic opinion" in *Addyston Pipe & Steel.*

The Court went much further in the recent case of *United States* v. *Columbia Pictures Corp.*, 189 F. Supp.

153 (S. D. N. Y. 1960), than it had in *Bausch & Lomb.* In *Columbia Pictures,* the Court restated the ancillary restraint doctrine as follows:

> "Where challenged conduct is subservient or ancillary to a transaction which is itself legitimate, the decision is not determined by a *per se* rule. The doctrine of ancillary restraints is to be applied. It permits, as reasonable, a restraint which (1) is reasonably necessary to the legitimate primary purpose of the arrangement, and of no broader scope than reasonably necessary; (2) does not unreasonably affect competition in the marketplace; and (3) is not imposed by a party or parties with monopoly power.
>
> "United States v. Bausch & Lomb Optical Co., D. C. S. D. N. Y. 1942, 45 F. Supp. 387, affirmed by an equally divided court, 1944, 321 U.S. 707, 64 S. Ct. 805, 88 L. Ed. 1024; Bascomb Launder Corp. v. Telecoin Corp., 2 Cir., 204 F. 2d 331, certiorari denied 1953, 345 U.S. 994, 73 S. Ct. 1133, 91 L. Ed. 1401 (followed Bausch & Lomb, supra); Walt Disney Productions v. American Broadcasting-Paramount Theatres, Inc., D. C. S. D. N. Y. 1960, 180 F. Supp. 113" (p. 178).

Pursuant to the ancillary restraint doctrine, the Court upheld an agreement whereby one motion picture producer (Universal) designated a wholly-owned subsidiary of another producer (Screen Gems) as its exclusive distributor for the distribution of its films for television purposes. Not only was the joint venture upheld, but so were two restrictions which go further than the territorial exclusives involved in this appeal:—

> (a) A provision giving Universal a continuing voice in the distribution of its film by Screen Gems (p. 179).

(b) A provision whereby Universal was permitted to prescribe a minimum rate schedule below which Screen Gems could not market its film (p. 161).

Apart from a joint venture context, the above provisions would probably be considered *per se* antitrust violations. Nevertheless, the Solicitor General, in its brief to the Supreme Court in *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967) (on which the opinion of the District Court in this case was based), referred to the foregoing restrictions as appropriate to the joint venture relationship between Universal and Screen Gems (see pp. 25-26 of brief).

This Court in *Sealy,* in reversing the lower court's determination that Sealy's territorial exclusives were lawful, never reached the issue whether the territorial exclusivity accorded the Sealy licensees was valid as ancillary to the legitimate purpose of the Sealy joint venture. This was because it held the territorial exclusives unlawful as a "part of 'an aggregation of trade restraints' including unlawful price-fixing and policing" (p. 357). The question of relief was not before this Court.

The Court below in this case, purporting to rely on this Court's opinion in *Sealy,* ruled that Serta's exclusive territorial allocations were *per se* illegal (see pp. 12a-13a, below). This, in Serta's view, misreads this Court's opinion, which condemned Sealy's territorial allocations as "*a part of* the unlawful price-fixing and policing" (p. 356) and, *in the light of* such "an aggregation of trade restraints," foreclosed further inquiry as to justification or reasonableness (p. 357).

Moreover, the Court below conceded, with respect to interbrand competition and Serta's price-fixing activities:—

> "There may be situations in which such competition authorizes some conduct that is otherwise forbidden by the Sherman Act. Compare *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). An extraordinary situation must be present, however, to warrant such special attention; an example might include a grave danger of reduced competition within the industry if the challenged practice were outlawed" (see page 12a, below).

Serta accepts the trial court's rejection of this possibility insofar as it relates to price-fixing, but it must point out that the trial court, despite *Schwinn,* did not permit Serta to offer proof on whether the banning of exclusive territories would reduce competition, much less deal with that issue in its opinion.

Moreover, the Antitrust Division interprets *Schwinn* much more strictly than did the Court below and is maintaining that territorial exclusives are illegal *per se* in all circumstances, except in the case of new entrants into an industry. See statements of Assistant Attorney General Turner in Panel Discussion on *Orderly Marketing, Franchising and Trademark Licensing,* 1968 N. Y. State Bar Ass'n. Antitrust Symposium 27, at pp. 31, 35, 43, 44 and of First Assistant Zimmerman, *Distribution Restrictions After Sealy and Schwinn,* 12 Antitrust Bulletin 1181, at 1187-8 (1967)[7]. This Court in *Sealy* refrained from any such blanket condemnation.

---

[7] For an indication of some of the unsolved problems raised by *Schwinn,* see the statement of Philip F. Zeidman, General Counsel, Small Business Administration, *The Growth and Importance of Franchising—Its Impact on Small Business,* 12 Antitrust Bulletin 1191, at pp. 1201-2 (1967).

Accordingly, it is of great moment to the business community that this Court clarify the situations in which the ancillary restraint doctrine justifies exclusive territories, as well as the extent to which a trial court, in fashioning relief appropriate to a price-fixing violation, may ignore proffered evidence that territorial exclusives are consistent with the maintenance and promotion of competition.

C. The Court Below Erred in Enjoining Exclusive Territories for Products Bearing the Common Trademarks of the Serta Joint Venture (Sec. IV(D) of the Final Judgment).

The Court below described Serta's price-fixing as "both flagrant and pervasive" (see p. 13a, below),[8] placing stress on some 90 "incidents," occurring between 1939 and 1967, which related to comparative, co-operative and other kinds of advertising activities and did not directly involve price-fixing (see pp. 4a, 6a-11a, below). Yet, despite this background of price-fixing, the Court quite properly permitted, as a necessary

---

[8] Serta objects to this characterization, but this appeal can be disposed of without entering into that issue. For a partial indication of the extent to which the trial in this case disclosed that Serta's restrictions on advertising and sales were sporadic incidents in a generally prevailing pattern of price competition at the retail level, see App. C, hereto. Also, the trial court's statement that the evidence of price-fixing produced at the Serta and Sealy trials "is quite similar" (see p. 2a, below) is incorrect. Unlike the situation in *Serta*, there was no extended trial on price-fixing in *Sealy*; Sealy put in a token defense limited to two witnesses, as contrasted with 2½ weeks of trial in the *Serta* case. Moreover, the trial court uncritically adopted (see page 9a, below), the Government's conclusionary finding of fact on price-fixing, which was a Chinese copy of the *Sealy* trial court's ultimate finding of fact (and quoted in this Court's *Sealy* opinion). This Court has had occasion to frown on such "mechanically adopted findings," see *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1964).

incident of a national advertising joint venture, the fixing of a uniform price at which Serta products can be advertised in national advertising media:—

> "In order to advertise prices in the national media, such as network television and major magazines, the defendant must be able to employ a single price for its products; the Government thus concedes that the defendant may suggest retail prices in national advertising" (see page 10a, below).

In like fashion, sales by outside Serta licensees into a trade area served by an established licensee are completely inconsistent with the basic concept of the Serta joint venture, which is to build up the business good will of the participating licensee. The trial court should have taken account of this in framing its decree, and not entered Section IV(D) of its Final Judgment, prohibiting territorial exclusives. Since the Justice Department concedes that the Serta joint venture as such is legal, a provision such as territorial exclusivity, which goes to the heart of the joint venture, must also be valid. This conclusion, as Serta will shortly show, is quite consistent with this Court's Opinion in *Sealy*.

However one might characterize Serta's price-fixing activities, they were clearly much more sporadic and peripheral than the horizontal price-fixing and vertical resale price maintenance contracts that so dominated and pervaded the distribution system condemned by this Court in *Bausch & Lomb*, see 321 U.S. 707, at pp. 719-721 and 723-724. Yet when the Government requested "a modification of the decree to make permanent the six months' prohibition against Soft Lite's systematically suggesting resale prices on its lenses and the execution of resale price maintenance contracts under the Miller-Tydings Act," this Court denied the

request (*ibid.*, p. 729). Since the Miller-Tydings Act is a statute conferring an immunity from the Sherman Act offense of fixing resale prices, a much stronger case can be made for the retention of territorial exclusivity, which promotes interbrand competition and is ancillary to a lawful joint venture.

Granting the existence of illegal price-fixing in this case, the Court below, in prohibiting the grant of exclusive territorial trademark rights, overlooked a vital consideration—that there must be a necessary connection between the territorial exclusivity and the price-fixing. The Court did not permit Serta to show that there was no such connection, and that the retention of territorial exclusivity would not promote price-fixing. However, there would appear to be enough evidence in the record to justify the conclusion that price-fixing can be effectively prevented without banning territorial exclusives:—

(a) Territorial exclusivity went into effect as a Serta policy in 1933 (see Stipulation contained in Order of January 9, 1968, p. 3 [Item 181]). On the other hand, despite the exhaustive scrutiny to which Serta's pricing activities were subjected by the Government, the first case of illegal price-fixing activity in the record occurs on November 5, 1938 (GX-300), five years later.

(b) The presence of interbrand competition *within the licensee's protected area* was sufficient, independently of sales by outside Serta licensees, to cause the licensees' prices to their department and furniture store outlets to vary (see pp. 7-8, above). This is the area, if any, where the licensees' self-interest would most strongly incline them to price-fixing, yet territorial allocations clearly did not result in any price-fixing.

(c) The fixing of retail prices is desired mainly by the licensees' customers, and confers no financial benefit on the licensees. The Serta licensees therefore have no interest in any price-fixing activity which would justify subjecting themselves to the contempt sanctions attendant upon violation of the price-fixing injunctions of the Final Judgment.

There are thus two independent grounds for this Court directing the elimination of Section IV(D) from the Final Judgment. The first is the basic incompatibility of not allowing the participants in a joint trademark licensing and advertising venture to reap the expected fruits of the venture—the exclusive enjoyment in their respective areas of the good will generated by the venture and by their own local efforts in further promotion of the common Serta trademarks. This factor alone would appear to be dispositive of the present appeal.

The second independent ground for reversing the Court below is that the prevention of price-fixing can be accomplished without an injunction against exclusive territories. This, of course, assumes that Serta's exclusive territories are valid as ancillary to a lawful joint venture, the point which has been made on pp. 14 to 19, above.[9]

---

[9] Should this Court be of the view that the record in this case is insufficient to sustain either of the foregoing independent grounds for directing the striking of Section IV(D) from the Final Judgment, it must be borne in mind that the trial court foreclosed Serta from presenting evidence relating to those issues, by refusing to try the territorial issue and by denying Serta the opportunity to make an offer of proof (see page 10, above). On this basis, the case should be remanded to the trial court, with a direction to hold a hearing on those issues in relation to Section IV(D) of the Final Judgment.

CONCLUSION

WHEREFORE, appellant Serta prays this Court that it order the modification of the Final Judgment by directing the Court below to eliminate Section IV(D) therefrom.

SIGMUND TIMBERG
815 15th Street, N. W.
Washington, D. C. 20005

ALAN J. ALTHEIMER
LIONEL G. GROSS
DAVID V. KAHN
ROGER B. HARRIS
One North LaSalle Street
Chicago, Illinois 60602

Attorneys for
Serta Associates, Inc.

December, 1968

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 60 C 843

UNITED STATES OF AMERICA, *Plaintiff*,

v.

SERTA ASSOCIATES, INC., *Defendant*.

Memorandum Opinion

The Government alleges that defendant Serta Associates, Inc. and its stockholder-licensees combined and conspired to fix retail prices and allocate exclusive geographical territories in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. After a lengthy trial, I conclude that both allegations have been sustained.

Serta is a Delaware corporation with its headquarters and principal place of business in Chicago, Illinois. All of its stockholders are independent bedding manufacturers which have contracts with the defendant to use Serta trademarks within mutually exclusive territories. Besides registering trademarks, Serta also adopts specifications for its trade name bedding and conducts extensive advertising. During 1931, the year in which it was incorporated, Serta granted licenses to fourteen formerly independent regional mattress manufacturers; currently, there are forty stockholder-licensees located throughout the United States. The licensees' annual fees, currently amounting to more than one million dollars, provide the primary financing for Serta's operations.

Though the defendant strenuously maintains that its bylaws and regulations impose vertical restrictions on the licensees, the internal organization of Serta Associates

indicates that it is the product of horizontal cooperation among manufacturers who might otherwise compete with one another. The stockholder-licensees select the Board of Directors and chief executive official who, in turn, actively manage the defendant's business affairs. Annual meetings are held at which the licensees propose, discuss and vote upon resolutions of mutual interest, adopting rules that are binding upon them all. Normal topics for these meetings include suggested retail prices and cooperative advertising programs.

The complaint was originally filed in May 1960, but the trial was stayed pending the outcome of a contemporaneous companion case, *United States* v. *Sealy, Inc.*. After the district court held that Sealy had fixed prices, 1964 CCH Trade Cases ¶ 71,258, the Supreme Court held that the company's allocation of exclusive territories, when combined with its unlawful price fixing activities and policing, was illegal *per se*, *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967). The *Sealy* case and the instant case present virtually the same facts; both are essentially horizontal combinations which have conspired to fix prices and allocate closed geographical territories. The Government alleged identical antitrust violations in the two cases, and the evidence produced at the two trials is quite similar.

By stipulation between the parties, the following facts were established:

> "Since at least 1933, Serta Associates, Inc. has had a continuous agreement with each of its licensees not to license any person to manufacture or sell Serta products in a licensee's designated area; and each licensee has agreed not to manuufacture or sell Serta products outside its designated area.
>
> "Since 1940, Serta Associates, Inc. and its licensees have adhered to and enforced the mutually exclusive-territorial agreements."

On the Government's representation that the proof in this case would be substantially similar to that in *Sealy,*

this court decreed that the trial would initially concern only the price fixing issue. If the Government prevailed on that issue, the doctrine of Sealy would then apply so that trial of the territorial allocation issue would not be necessary.

The evidence may be roughly divided into three categories: (1) the by-laws, rules and regulations of Serta, (2) the uniform license agreement entered into by Serta and each of the licensees, and (3) ninety specific instances of conduct by the defendant which, according to the Government, indicate that the rules, regulations and license agreements constitute an attempt to fix prices. The evidence is discussed as a whole in the first section of this opinion. Thereafter, I will deal with three specific aspects of the case: first, Serta's advertising practices; second, its rules, regulations, and licenses, ignoring the defendant's conduct; and, finally, Serta's argument that interbrand competition in the bedding industry is relevant to this decision.

I. Price Fixing Generally

Since *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), it has been clear that price fixing is *per se* illegal. This includes any tampering with price, regardless of whether that be minimum or maximum prices; *see Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Kiefer-Stewart Co.* v. *Seagram & Sons, Inc.*, 340 U.S. 211 (1951). In flagrant violation of this prohibition, the shareholder-licensees of Serta Associates, acting as the Board of Directors, the Executive Committee, and as shareholders, met regularly and discussed and fixed the retail prices at which Serta products would be advertised and sold.[1] More-

[1] There has been no allegation that the licensees have conspired with their dealers (the retailers) or that the retailers have cooperated with one another; such further collaboration may not have been necessary if the Serta-licensees' agreement, when combined with the exclusive territories, exerted sufficient influence on prices.

over, Serta licensees requested their dealers to maintain advertised retail prices and minimum retail prices; the retailers were also asked to limit comparative price advertising. In response, the licensees routinely received assurances of cooperation from the dealers. Advertising and sales below the suggested prices were policed by Serta and the licensees; those who violated the rules were reprimanded and, occasionally, cut off from Serta products.[2]

A. The Agreement between Serta and the Licensees

The Government introduced evidence of ninety "incidents," occurring between 1939 and 1967, in which Serta Associates and/or its licensees tried to influence prices.[3]

---

[2] In 1958 Serta Associates headquarters and the Nashville licensee complained to the Chattanooga licensee about price cutting on the "Serta Posture" by the Factory Furniture Company of Knoxville, an outlet owned and supplied by Fielden Furniture Store, Knoxville, Tennessee. Thereafter, the Chattanooga licensee discontinued selling Serta mattresses to Fielden, writing to Serta Associates that:

> "We have never sold this firm [Factory Furniture Company] and have no intention of selling them. We do know the source from which this merchandise was secured, and have advised the Fielden Furniture Company that we could no longer ship them since the management of this store is interested in the Factory Furniture Outlet."

Moreover, Joseph Marland, the representative of the Chattanooga licensee, testified at trial that he investigated these two stores through his salesmen and through a special Dun & Bradstreet inquiry.

[3] For example, in 1939 the Hall Watson Furniture Company in Corbin, Kentucky, advertised the "Perfect Sleeper" mattress and box spring in the *Corbin Tribune* for less than $39.50 each, the suggested retail price. The Chattanooga licensee sent copies of the ads to Serta Associates, requesting the national headquarters to reprimand the furniture store and to notify other licensees who might be able to force the dealer to stop its objectionable

Defendant emphasizes that these incidents covered a period of almost thirty years, allegedly indicating that there was no conspiracy. Furthermore, Serta introduced a volume of repetitive testimony and numerous exhibits to demonstrate that deviations from the suggested price were permitted in actual selling prices.[4] These observations merely indicate that the conspiracy was less than 100% effective.

---

practices. The Treasurer of Serta then wrote to the Watson Furniture Company as follows:

> "We are going to ask you to discontinue the practice of selling this mattress and box spring at less than $39.50 each and also any other of our nationally advertised merchandise at less than the resale price appearing on the label.
>
> "In the event we find a repetition of this policy we shall be forced to turn the matter over to our attorneys and forced to take legal action."

Another illustration of Serta's policing occurred on July 11, 1961 when the Chicago licensee complained to Serta Associates that one of the Omaha licensee's retail store accounts in Muscatine, Iowa had sold "Perfect Sleepers" below the preticketed price and furthermore that Muscatine, Iowa was Chicago's and not Omaha's territory. The Chicago licensee filed a complaint charging that Omaha be fined $1,000 for this price and territory violation of the license agreement. Eventually, the Omaha licensee "ceded" the sales right to four Iowa counties to the Chicago licensee in September 1961, and the Chicago licensee withdrew his charges against the Omaha licensee. Thereafter, on September 26, 1961 the president of the Chicago licensee wrote to the president of the Omaha licensee as follows:

> ". . . if at any time you hear of our dealers breaking the price of the Perfect Sleeper—or any other suggested retail prices, please feel free to let us hear from you immediately as we are most anxious to protect all Serta dealers."

[4] Most of the instances of tolerated price cutting without reprimand or reprisal on the part of Serta occurred after the institution of these proceedings.

When the conduct of Serta and its licensees is combined with the by-laws,[5] rules, regulations, and standard license agreement,[6] defendant's attempt to fix prices is clear. Specifically, Serta's Rule 7, adopted in 1945, stated that:

> "All Serta Identification Labels and Tags where a suggested retail price is shown are furnished to you with the understanding that you will request the cooperation of your local dealers in selling the article at the suggested retail price. In states where there is a Fair Trade Law in effect legally regulating the maintenance of retail prices, each licensee must properly qualify under such law."[7]

Similarly, by "preticketing" Serta products, (i.e., affixing a retail price label), Serta and the licensees induced retailers to maintain the suggested retail prcies. The licensees also distributed retail price lists and sales material containing the suggested prices to the dealers.

B. Advertising

Since 1940, Serta and its stockholder-licensees have periodically agreed upon minimum prices below which Serta mattresses could not be advertised, promulgating a "Local Advertising, Merchandising, and Sales Promotion" rule that is contractually binding on all licensees by their licenses. That rule (number two) has recently provided, in part, that:

> "No Serta Member shall furnish Serta identified products to any dealer unless the dealer when using price comparisons in his selling and advertising shall limit same to not over ⅓ off."

---

[5] See, e.g., those adopted March 8, 1956.

[6] E.g., paragraph eight.

[7] In 1954 the phrase "must properly qualify" was changed to "urged to properly qualify."

Serta and its licensees have enforced this rule by policing both advertising and selling practices.[8]

In addition, Serta and its licensees influenced the retailers' advertised prices by offering cooperative advertising programs, whereby advertising mats, sales material, and a portion of the cost were supplied by Serta; however, a dealer was not allowed to participate in the program unless all of his advertisements contained Serta's suggested retail prices. When combined with the surveillance of all advertising, this practice hampered dealers who wanted to sell below the advertised price because they had only three options; they could advertise Serta standard

---

[8] To illustrate, the General Manager of Serta Associates, Inc., by memorandum dated June 11, 1956, informed the San Francisco licensee about an ad run by Baker & Stanton in the *Humboldt Standard*, Eureka, California on June 28, 1956:

> "... in which they are listing all types of Serta mattresses, including the Perfect Sleeper, etc., as stock they purchased from you that was shown in your San Francisco showroom. Prices are broken down from the regular prices and, as you know, this is not permissible."

Ten days later, in a separate incident, Serta's General Manager informed the West Palm Beach, Florida, licensee that he had a tear sheet from the July 5, 1956 *Key West Citizen* in which an ad was run by the Gomez Furniture Company listing a "SertaLux" box spring or mattress at $34.95. The General Manager stated further:

> "I'm sure that you are well aware that, first, you cannot permit any dealer to sell Serta Lux Mattress below the advertised price of $39.95. . . .
>
> "Please advise me immediately that you have taken this up with the dealer sending me copies of correspondence, etc., so that I may know that this has been stopped."

By letter dated August 2, 1956, the West Palm Beach licensee responded to the General Manager:

> "In addition to policing the territory, so to speak, it is nice to know that you folks are keeping an eye on what is going on in the various territories."

items at the prices contained in the specifications, advertising without using a price, or refrain from any advertising.

C. Miscellaneous Offenses

In their attempt to stabilize prices, Serta and its shareholder-licensees also agreed that certain practices were so likely to disrupt the price structure that they should be forbidden. Specifically, no group selling arrangements were permitted with national or regional accounts unless that account maintained the advertised prices. Second, no "give aways" or "trade-ins" were allowed; these practices might otherwise have served to reduce the price actually being charged. Third, when mattresses were made to a dealer's individual specifications, no discounts in actual or advertised praces were permitted by the dealer.[9] Finally, advertising below the suggested minimum prices was forbidden during the period of semi-annual promotions.

D. Conclusion

Serta's by-laws, rules, regulations, and standard license agreements, when combined with the numerous incidents documented by the Government's exhibits, demonstrate

---

[9] Since 1955 Rule 6 has provided:

"6. No suggested retail price may be shown on any kind of label or tag including a price tab attached to any product carrying any kind of Serta identification including law labels showing Serta as a part of a member's factory name, or in any kind of advertising, merchandising, sales promotion or sales material used in connection with such product—*except* where used on a Serta standard item on which specifications and suggested retail price have been issued by the Serta Central Office—or *except* where used on a Serta labeled item made to a dealer's individual specifications, under his name, and with the definite understanding that such item will always be sold at the retail price shown on the label."

that the stockholder-licensees met, discussed and agreed upon:

(a) The retail prices at which Serta products could be sold;

(b) The retail prices at which Serta products could be advertised;

(c) The comparative prices at which Serta stockholder-licensees and Serta retailers could advertise and sell Serta products;

(d) The minimum retail prices below which Serta products could not be advertised;

(e) The minimum retail price below which Serta products could not be sold;

(f) The means of inducing or enforcing adherence to these agreed-upon prices; and,

(g) The arrangements whereby each stockholder-licensee was granted an exclusive territory within which it could maintain retail prices free from any interference or competition from any other stockholder-licensee.

II. Price Fixing: Alternative Grounds

As indicated above, I believe the ninety instances of conduct by the defendant interpret and give additional meaning to the by-laws, rules, regulations and license agreements, indicating that these written documents constitute an agreement to fix the retail prices of Serta identified products. Even if I were to ignore those incidents, however, I would still find the defendant guilty of price fixing.

A. Advertising Restrictions

Serta and its licensees admit agreeing to regulate the prices at which Serta products could be advertised, both

on the national level and within local markets. In order to advertise prices in the national media, such as network television and major magazines, the defendant must be able to employ a single price for its products; the Government thus concedes that the defendant may suggest retail prices in national advertising. On the other hand, interference with local advertising violates the strict *per se* prohibition of all tampering with price. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927). For reasons explained below, all attempts to influence the locally advertised prices of the dealers are illegal, including price restrictions in Serta's cooperative payment program.

Two important reasons for having a *per se* price fixing rule are to prevent interference with competitive market forces and with traders' freedom. As stated in *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 213 (1951), maximum price agreements, "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." See *Albrecht* v. *Herald Co.*, 390 U.S. 145, 152 (1968). The local restrictions clearly interfere with the retailers' freedom to advertise at the price they deem best. By restraining dealers from aggressive, price-cutting advertising, they also stifle competition among the retailers. In this day of mass media, price advertising is the very heart of vigorous competition. Since Serta's restraints on local advertising thus infringe the purpose of this rule, they are also illegal *per se*.

Potential price cutters cannot inform the local public of their lower prices and thereby attract price conscious customers. With fewer customers, retailers do not obtain the full benefit of lower prices—a greater volume of sales. As a consequence, defendant's advertising restraints discourage retailers from lowering their actual selling price. *Compare United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 35

(1960), where efforts to eliminate cut-price advertising were condemned in a vertical agreement case (normally treated more favorably than horizontal agreements). Similarly, circulation of a price list among competitors was forbidden in *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208 (1939), because the list prices were likely to be the prices for the future, thus allowing the competitors to price their merchandise accordingly; the instant local restrictions on advertising, when combined with the "suggested retail prices," result in an even more accurate prophecy of retailers' future prices.

B. Serta's Written Agreement

Defendant's massive attempt to overpower the government's "incidents" indicates an apparent failure to understand the broad sweep or [sic] the *per se* rule against price fixing. The antitrust laws condemn *all* price regulating agreements, not only those which are effective. Serta's by-laws, rules, regulations, and standard license agreements clearly indicate an attempt to stabilize prices for Serta identified products. See the discussion of rules 7 and 2 above. Serta maintains that the purpose of its price restraints is to convince the public that its products are of equal quality as those of competitors, particularly the Simmons company; Serta feels the public will not believe this if Serta products are priced far lower than those of Simmons. While improper motives may render unlawful certain otherwise legal practices, activities subject to *per se* condemnation are judged independent of the defendant's motives. *Thomsen* v. *Cayser,* 243 U.S. 66 (1917); *Standard Sanitary Manufacturing Co.* v. *United States,* 226 U.S. 20 (1912). This is particularly true when a practice tends to stifle competition, as in the instant case.

C. Interbrand Competition

Finally, defendant argues that its agreement to stabilize prices should be excused because the Simmons company,

which allegedly dominates the industry, can legally establish uniform prices throughout the country since it is a single integrated corporation. Dire consequences are hinted if Serta is not allowed to price its products in the same manner. Certainly it would be unfortunate if the Sherman Act's major result were to prompt merger, consolidation or liquidation by otherwise viable businesses. But see *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966), concerning horizontal mergers.

Also, Serta maintains that the bedding industry is characterized by vigorous interbrand competition, and Serta says its practices should be excused for that reason. There may be situations in which such competition authorizes some conduct that is otherwise forbidden by the Sherman Act. *Compare United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). An extraordinary situation must be present, however, to warrant such special attention; an example might include a grave danger of reduced competition within the industry if the challenged practice were outlawed.

In the instant case, however, I see no reason why the cessation of price fixing will either hinder Serta's competitive position or undermine interbrand bedding competition generally. If anything, it should serve to stimulate competition in the mattress industry by allowing Serta's retailers greater freedom in discounting advertised and selling prices. Perhaps those reductions will, in turn, prompt similar price reductions by the industry's other major firms.

III. Serta's Territorial Allocations

In conformity with the Supreme Court's recent decision in *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), Serta's exclusive teritorial allocations are also *per se* illegal. See *United States* v. *General Motors*, 384 U.S. 127 (1966); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593

(1951). There is an "aggregation of trade restraints" present in the instant case, including both unlawful price fixing and illegal policing of that arrangement. Serta's territorial divisions are the product of a horizontal combination among the licensees as fully as was the case in *Sealy* (388 U.S. 352).

The Supreme Court's description of Sealy, Inc. is also an accurate account of Serta's activities.

> ". . . The territorial restraints were a part of the unlawful price-fixing and policing. . . . [T]hey gave to each licensee an enclave in which it could and did zealously and effectively maintain resale prices, free from the danger of outside incursions. It may be true, as appellee vigorously argues, that territorial exclusivity served many other purposes . But its connection with the unlawful price-fixing is enough to require that it be condemned as an unlawful restraint and that appellee be effectively prevented from its continued or further use.
>
> ". . . [T]he arrangements for territorial limitations are part of 'an aggregation of trade restraints' including unlawful price-fixing and policing. . . . Within settled doctrine, they are unlawful under § 1 of the Sherman Act without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the market place, or their reasonableness." 388 U.S. 356-58.

Although defendant maintains that the Supreme Court's reference to "flagrant and pervasive price-fixing" (388 U.S. 355) distinguishes this case from that one, I cannot agree for two reasons. First, Serta's price-fixing activity is both flagrant and pervasive; second, I interpret the *Sealy* opinion to require only an "aggregation of trade restraints" for territorial divisions to be *per se* unlawful, not an additional finding concerning the quality of the price-fixing or other abuse.

III. Conclusion

For the foregoing reasons, both Serta's price fixing and its territorial allocations constitute violations of § 1 of the Sherman Act. The Government will be given twenty days in which to submit its proposed order enjoining the defendant from continuing these abuses.

Enter:

Bernard M. Decker
United States District Judge

Dated: August 9, 1968.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 60 C 843

United States of America, *Plaintiff*,

v.

Serta Associates, Inc., *Defendant*.

Final Judgment

Plaintiff, United States of America, filed its complaint herein on May 31, 1960 against the defendant, Serta Associates, Inc., alleging that said defendant and its stockholder-licensees combined and conspired to fix retail prices and allocate exclusive geographical territories in violation of Section 1 of the Sherman Act. After trial of the issue of retail price fixing, the court on August 9, 1968 entered its Memorandum Opinion, incorporating therein its findings of fact and conclusions of law, holding that the defendant, Serta Associates, Inc., and its licensees combined and conspired to fix retail prices and allocate exclusive geographical territories.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

I

This court has jurisdiction of the subject matter hereof and of the parties hereto.

II

As used in this judgment:

(A) "Defendant" means Serta Associates, Inc.

(B) "Consenting licensee" means a manufacturer of Serta products which files with this court its signed consent to be bound by the terms of this judgment.

(C) "Serta products" means products sold under any Serta trademark or trade name or manufactured in accordance with any Serta specifications.

(D) "Products" includes such items as mattresses, foundations, combinations, and sleepers.

(E) "Mattress" means an item of bedding designed to be used as a pad for a bed, usually resting upon bed springs or other support. It is normally composed of an outer covering enclosing inner spring, or a filling of latex, synthetic foam, felt or other materials, or both.

(F) "Foundation" means an item of bedding apart from the bedstead, designed to support the mattress and often to provide additional cushioning.

(G) "Combination" means a mattress and a foundation manufactured to be sold together as a matched set.

(H) "Sleeper" means a sofa bed, studio couch, Hollywood bed ensemble, or the like.

III

Defendant Serta Associates, Inc. and its stockholder-licensees have combined and conspired to fix retail prices and allocate exclusive geographical territories in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

IV

(A) Defendant and consenting licensees are each enjoined and restrained from maintaining, adhering to, enforcing, or claiming any rights under any combination, contract, agreement, understanding, plan or program between or among themselves or any other licensee or manufacturer of Serta products to fix, determine, maintain or adhere to retail prices or other terms or conditions of sale for any Serta products to any third person; provided that the defendant and such manufacturers may agree upon and use suggested retail prices solely for the purpose of national advertising of any Serta products if the words "suggested retail price," or words of similar import, are made a prominent part of such advertising.

(B) Defendant and consenting licensees are each enjoined from making payments of any advertising allowance to any person on the condition that he advertise only at the resale prices suggested by the defendant or consenting licensees.

(C) Defendant and consenting licensees are enjoined and restrained from requiring or compelling any person to: (1) adhere to any fixed, suggested or specified retail price at which any Serta products are sold or advertised or (2) limit or restrict the use of retail prices in advertising Serta products, or (3) refrain from giving free merchandise or trade-in allowances to purchasers of Serta products.

(D) Defendant and consenting licensees are each enjoined and restrained from maintaining, adhering to, enforcing, or claiming any rights under any combination, contract, agreement, understanding, plan or program between or among themselves or any other manufacturer of Serta products, to limit or restrict any manufacturer in any substantial way to sales of Serta products within a prescribed territory.

V

Within 180 days from the date of entry of this judgment, Serta Associates shall cancel all provisions of all its licenses, by-laws, rules and regulations which are inconsistent with any provision of this judgment. Serta shall also file with this court and serve upon the plaintiff within 210 days from the date of the entry of this judgment an affidavit as to the fact and manner of its compliance with this paragraph.

In order to continue or to issue any license to manufacture or sell products in the United States under any Serta trade name or trademark, Serta Associates shall require each licensee to file with this court, with a copy to be served on plaintiff, its consent to be bound by the terms of this judgment. Serta Associates, Inc. must cancel any license if the licensee will not so agree. Moreover, Serta shall serve upon each manufacturer which has a Serta license copies of the complaint and the final judgment in this action, with Serta maintaining a record of the fact and the date of such service.

VI

The provisions of this judgment which are applicable to Serta or its consenting licensees shall also apply to their officers, agents, servants, employees, subsidiaries, successors, assigns, and anyone in active concert with persons who receive actual notice of this judgment.

VII

For the purpose of securing compliance with this judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and upon reasonable notice to the defendant or any consenting licensee made to its principal office, be permitted:

(A) Access during the office hours of such defendant or consenting licensee to all books, ledgers, accounts, corre-

spondence, memoranda and other records and documents in its possession or control which relate to any matters contained in this judgment.

(B) Subject to the reasonable convenience of the defendant or the consenting licensee, and without restraint or interference from such defendant or consenting licensee, to interview officers or employees of the defendant or such consenting licensee, who may have counsel present, regarding any such matters.

Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, defendant or any consenting licensee shall submit such written reports with respect to any matters contained in this judgment as may from time to time be necessary for its enforcement.

No information obtained by the preceding methods shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this judgment.

VIII

This court retains jurisdiction to enable the parties to this judgment, including consenting licensees, to apply for additional directions as may be necessary or appropriate for the construction or enforcement of the judgment, or for modification or termination of its provisions.

ENTER:

BERNARD M. DECKER
United States District Judge

Dated: September 30, 1968.

APPENDIX C

Sales Below Suggested Prices at Retail Level

At the trial of the price-fixing issue, Serta sought to establish that the sale by its licensees of Serta nationally advertised bedding to retailers who regularly resold those items at below the nationally advertised price was so continuing and widespread that such resale price maintenance as took place could not have been conspiratorial in nature or central to Serta's operation. Among the situations disclosed at the trial were:—

(1) Serta's Austin, Texas, licensee became a success story by advocating to its retailers that they resell Serta nationally advertised bedding at below the suggested retail price. This licensee currently sells to three retailers whose annual purchases of such bedding are $750,000, $125,000 and $100,000, respectively, and each of whom regularly sells at below the suggested price (Tr. 1340-44, 1346-51, 1359-64, 1367, 1375-76).

(2) The chief customer of Serta's Omaha, Neb., licensee, who during the last five years has bought almost 30% of that licensee's Serta merchandise bearing a suggested price, sold it regularly at below the suggested price (Tr. 526-27, 533-41). Discounting is so prevalent that a mattress cannot be bought for the suggested price in the entire Omaha market (Tr. 572).

(3) Two-thirds of the Chattanooga, Tenn., licensee's 2,000 customers consist of rural stores, which consistently sell Serta merchandise at below the suggested price (Tr. 662-683).

(4) Serta's Philadelphia licensee made a tabulation, indicating that, in 1966, it sold $1,154,000 of Serta merchandise to retailers who regularly resold the same at below the suggested price (Tr. 964-983).

(5) During the past 11 years, all of the stores buying Serta's Perfect Sleeper from the Augusta, Georgia, licensee have, at one time or another, sold that mattress at below the suggested price (Tr. 1052-1053).

(6) The bulk of the customers of the Westbrook, Maine, licensee are small rural stores, each of which has consistently sold Serta merchandise at below the suggested price (Tr. 1146-1156, 1179).

(7) The Lancaster, Pa., licensee estimated that about 50% of his customers sell at below the suggested price (Tr. 1191-1209).

(8) Ten of the Greensboro, N. C., licensee's fifteen biggest customers (those purchasing in excess of $20,000 a year) regularly sell Serta merchandise at below the suggested price (Tr. 1951-63, 1974-75, 1989).

(9) The purchaser of 38% (amounting to about $170,000 annually) of the Serta Perfect Sleepers sold by the Salt Lake City licensee has regularly resold the same at below the suggested price (Tr. 2306-14).

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 878

SERTA ASSOCIATES, INC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph (1)(c), of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the district court (J.S. App. B) in a civil antitrust action brought by the United States.[1] The court held (J.S. 1a–14a) that appellant violated Section 1 of the Sherman Act, 15 U.S.C. 1, by engaging in a scheme to fix retail prices and to allocate exclusive geographical territories among its licensees, and enjoined appellant from continuing these practices (J.S.

[1] This was one of four cases brought in May 1960 which challenged price-fixing and territorial allocation arrangements

14a–18a). Appellant has appealed only from that portion of the judgment banning further allocation of exclusive territories (J.S. 19, n. 8).

Serta Associates, Inc., was organized in 1931 by a group of regional bedding manufacturers seeking a cooperative method of nationally merchandising trademarked bedding products (J.S. 1a). The Serta trademark is today one of the leading national bedding brands, with total sales surpassed only by Simmons and Sealy (see J.S. 8).

Serta's stock is owned entirely by its 40 member-licensees,[2] each owning from 15 to 50 shares (GX 1, p. 6). A share of stock entitle the holder to one vote (GX 7, p. 2). Management of the corporation is vested in a seven-member board of directors composed of proxies or representatives of the licensee-shareholders (J.S. 1a–2a; GX 7, p. 4).

For approximately the first two years of Serta's operations, the licensees were free to sell wherever

---

in the bedding products industry. The arrangements in each case were virtually identical. In two of the cases, consent decrees were entered in which the companies agreed to eliminate territorial restrictions. *United States* v. *Restonic Corp.*, 1960 Trade Cases ¶ 69,739 (N.D. Ill.); *United States* v. *Spring-Air Co.*, 1962 Trade Cases ¶ 70,402 (N.D. Ill.). In the third case, *United States* v. *Sealy, Inc.*, 1964 Trade Cases ¶ 71,258 (N.D. Ill.), the district court held that Sealy had fixed prices, but that the company's allocation of exclusive territories was not an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. This Court reversed, holding that the allocation of exclusive territories, when combined with unlawful price-fixing activities, was illegal *per se* under Section 1. *United States* v. *Sealy, Inc.*, 388 U.S. 350.

[2] Of this number, 36 operate in the United States and four in Canada (J.S. 3).

and to whomever they chose. On November 26, 1932, Serta's executive committee, composed of Serta licensees or their representatives, initiated a policy of assigning exclusive territories to licensed manufacturers of Serta trademarked products.[3] (J.S. 7). Territorial

[3] At the opening of the trial, the district court, over the objection of appellant, entered an order separating the trial into two stages, one concerned with the allegations of price fixing and the other with the alleged territorial allocations. The order contained a statement of facts to which, according to the order, the parties had stipulated, namely:

> 1. In 1931, Serta Associates, Inc. under the name of Guardian Knight Corporation, was incorporated under the laws of the State of Delaware with its principal place of business in Chicago, Illinois.
>
> 2. Since its incorporation, Serta Associates, Inc. has been wholly owned by its licensees, independent mattress manufacturers.
>
> 3. Since at least 1933, Serta Associates, Inc. has had a continuous agreement with each of its licensees not to license any person to manufacture or sell Serta products in a licensee's designated area; and each licensee has agreed not to manufacture or sell Serta products outside its designated area.
>
> 4. Since 1940, Serta Associates, Inc. and its licensees have adhered to and enforced the mutually exclusive-territorial agreements.

This stipulation was agreed to by appellant through its attorney in open court (Transcript, January 8, 1968, pp. 8–12), and it is clear from this colloquy that appellant's objection was directed not to the accuracy of these statements, but to the procedure adopted by the trial judge in separating the trial into two portions (see *id.* at 11–12).

A copy of the district court's order is reprinted in full in the appendix to this motion.

Appellant claims that it was foreclosed from offering proof on the territorial issue by the district court. At the close of the case on the price-fixing issue the court suggested that appellant withhold any proffer on market allocation until after its decision on price-fixing (Tr. 2689–2690). Appellant did not renew its

allocations are expressly stated in the license agreements, but the Serta by-laws permit the licensees to collaborate between themselves in making adjustments or altering the geographical boundaries of each licensee's area (GX 7, p. 22; see also GX 1, p. 10). Indeed, adjacent licensees are encouraged to settle territorial disputes themselves, with the Serta central office playing as minimal a role as possible.[4] Serta licensees are not precluded from marketing private label products; Serta makes no attempt to regulate the activities of its licensees in selling non-Serta brands and no division of territories exists with respect thereto (GX 1, p. 10).

In addition to the maintenance of territorial allocations, Serta has followed a consistent policy of inducing retailers to sell and advertise Serta mattresses and box springs at agreed-upon retail prices. (GX 8, p. 6; GX 9, p. 3; GX 10–19, pp. 2, 7; GX 20, pp. 2, 8; GX 21–24; pp. 2, 9; GX 107, p. 2.) These prices are determined semi-annually by the Serta board of directors and ratified by the shareholders. The price lists are then disseminated by the Serta staff among licensees, and in turn licensees request their dealers to follow those prices (GX 387, 405, 1034; Tr. 2041–2042). Licensees are prohibited from supplying Serta

---

proffer until approximately two weeks after it filed its notice of appeal. This proffer was denied as untimely.

[4] The record contains a number of examples in which parties adjusted their territories, either on their own initiative, or as a result of inducement by the Serta office. (See, *e.g.*, J.S. 5a, n. 3; GX 1064–1070; GX 117, p. 4; cf. GX 117, p. 3).

products to any dealer who fails to limit comparative price selling and advertising to one-third off the list price (GX 16–19, p. 7; GX 20, p. 8; GX 21–24, p. 9). Furthermore, in order to stabilize prices, Serta has banned the use by Serta dealers of promotional devices which might disrupt the retail price structure (J.S. 8a; GX 16–24, p. 2.)[5]

In order to restrain dealers from advertising at cut prices, Serta and its licensees have established cooperative programs; Serta supplies advertising mats and sales material and subsidize part of the cost, but only to dealers willing to advertise at the suggested retail price (J.S. App. 7a–8a).

The policing of Serta's price maintenance policy, like that of policing its exclusive territories, is based almost entirely on licensee and dealer cooperation in reporting violations (Tr. 2033; GX 313, 352, 394, 405, 1035). Licensees have complained that a break in the price in one territory "was causing difficulties in other territories" (GX 352). Indeed, the Chicago

[5] The specificity of Serta's resale price restrictions is shown by its current Rule 5 (formerly Rule 6):

> 5. No suggested retail price may be shown on any kind of label or tag including a price tab attached to any product carrying any kind of Serta identification including law labels showing Serta as a part of a member's factory name, or in any kind of advertising, merchandising, sales promotion or sales material used in connection with such product—*except* where used on a Serta standard item on which specifications and suggested retail price have been issued by the Serta Central Office—or *except* where used on a Serta labeled item made to a dealer's individual specifications, under his name, and with the definite understanding that such item will always be sold at the retail price shown on the label. [J.S. App. 8a, n. 9; GX 16–24, p. 2.]

licensee recognized that undetected price-cutting by his dealers might create difficulties for adjacent territories and therefore requested the Omaha licensee to inform him of any breaks in suggested retail prices by Chicago Serta dealers (J.S. 5a, n. 3; GX 1043).[6] As an added check on dealer advertising, Serta subscribes to newspaper clipping services which afford it an opportunity for prompt discovery of price cutting by uncooperative dealers (GX 308, 310; Tr. 2464–2467).

ARGUMENT

In all material respects this case is identical with, and therefore controlled by, *United States* v. *Sealy, Inc.*, 388 U.S. 350, in which this Court recently held that a system of territorial allocations effectuated horizontally through a trademark licensing arrangement established by the licensee manufacturers of bedding products violated Section 1 of the Sherman Act (J.S. 2a). Appellant points to no material fact which would distinguish that precedent,[7] nor

[6] As he explained: "* * * if at any time you hear of our dealers breaking the price of the Perfect Sleeper—or any other suggested retail prices, please feel free to let us hear from you immediately, as we are most anxious to protect all Serta dealers."

[7] Appellant's assertion (J.S. 9–10) that "the complaint contains no allegation of horizontal price-fixing on the part of licensees, and the Government concedes that this is not an issue in the pending litigation" is misleading. The government did not charge a horizontal agreement to fix the price at which licensees sell to dealers; it did, however, charge, and the court below found, a horizontal conspiracy to fix retail prices (J.S. 9a). This is the same type of horizontal price-fixing found in *Sealy*. See 388 U.S. at 355.

Similarly, the fact that territorial restrictions were not imposed on the sale of non-Serta brands does not distinguish this arrangements from *Sealy*. Sealy's restrictions similarly applied

any new argument to justify reconsideration of it. Indeed, appellant presented the position it urges here, in an *amicus* brief in *Sealy*, and the Court obviously found it unpersuasive. Compare J.S. 11–22, with Brief *Amicus Curiae* of *Serta Associates, Inc.*, No. 9, Oct. Term, 1966, pp. 23–28. In these circumstances, plenary review of this case is not warranted.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ROBERT A. HAMMOND III,
Acting Assistant Attorney General.

GREGORY B. HOVENDON,
WILLIAM R. WEISSMAN,
Attorneys.

JANUARY 1969.

---

to Sealy products only, but this Court stated that this fact was "not consequential" to its holding that the arrangement was illegal. (*Id.* at 356, n. 3.)

APPENDIX

United States District Court
Northern District of Illinois
Eastern Division

Civil Action No. 60 C 843

[Entered January 9, 1968]

UNITED STATES OF AMERICA, PLAINTIFF

v.

SERTA ASSOCIATES, INC., DEFENDANT

At Chicago, Illinois in said Division and District on January 9, 1968.

ORDER

This cause coming on to be heard upon the Government's suggestion that consistent with the Supreme Court opinion in *United States* v. *Sealy, Inc.* and as a basis for separating the trial of this cause into separate stages or phases and thus limiting the issues and shortening the trial that the parties stipulate as to the existence of an agreement by and between the defendant and its licensees to allocate exclusive territory to manufacture and sell Serta brand mattresses, and the Government submitting that there is no genuine fact issue as to the existence of the above arrangement, the Government suggests that in order to save time that this trial in its initial stage be restricted to a determination of the issue of price maintenance and if the Court finds for the Govern-

ment this case will be concluded by the entry of appropriate findings of fact and a decree. If, on the other hand, the Court determines that the Government has failed in its proof on price maintenance, then consideration should be given to the illegality standing alone of the horizontal division of territory.

The Court having heard from counsel, being advised that the following facts are undisputed, and being otherwise fully advised in the premises, it is ordered that for the purpose of procedurally separating this case into stages or phases the following undisputed facts are found:

1. In 1931, Serta Associates, Inc. under the name of Guardian Knight Corporation, was incorporated under the laws of the State of Delaware with its principal place of business in Chicago, Illinois.

2. Since its incorporation, Serta Associates, Inc. has been wholly owned by its licensees, independent mattress manufacturers.

3. Since at least 1933, Serta Associates, Inc. has had a continuous agreement with each of its licensees not to license any person to manufacture or sell Serta products in a licensee's designated area; and each licensee has agreed not to manufacture or sell Serta products outside its designated area.

4. Since 1940, Serta Associates, Inc. and its licensees have adhered to and enforced the mutually exclusive-territorial agreements.

A recital of these undisputed facts is made for the purpose of limiting the issues and shortening the trial, but is not to be construed to preclude either party from offering evidence as to the reasons for the exclusive-territorial agreements, the methods used in enforcing them or obtaining adherence to them, or the results that have flowed from them. The opposing side reserves the right to object to the admissibility

of such evidence on the basis of competency, relevancy and weight.

The first phase of the trial will be limited to the price maintenance issue and after it is decided, a supplementary order will be entered, if necessary, controlling any further procedure in this case.

Enter:

/s/ BERNARD M. DECKER,
United States District Judge.

We agree that the foregoing Order is satisfactory as to form this 9th day of January 1968.

/s/ BERTRAM M. LONG,
Attorney for Government.

_____,
Attorney for Defendant.

U.S. GOVERNMENT PRINTING OFFICE: 1969

LIBRARY
SUPREME COURT, U. S.

FILED
MAR 20 1969
JOHN F. DAVIS, CLERK

No. 878

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

SERTA ASSOCIATES, INC., *Appellant*

v.

UNITED STATES OF AMERICA

On Appeal From the United States District Court for the Northern District of Illinois

PETITION FOR REHEARING

SIGMUND TIMBERG
815 15th Street, N.W.
Washington, D. C. 20005

ALAN J. ALTHEIMER
LIONEL G. GROSS
DAVID V. KAHN
ROGER B. HARRIS
One North LaSalle Street
Chicago, Illinois 60602

Attorneys for
SERTA ASSOCIATES, INC.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 878

SERTA ASSOCIATES, INC., *Appellant*

v.

UNITED STATES OF AMERICA

On Appeal From the United States District Court for the Northern District of Illinois

---

PETITION FOR REHEARING

Appellant, SERTA ASSOCIATES, INC., respectfully petitions this Court for a rehearing of the order of February 24, 1969 granting the Government's Motion to Affirm and affirming the District Court's judgment, and requests that the Court now vacate that order and note probable jurisdiction.

GROUNDS FOR PETITION

This Petition for Rehearing is submitted to call attention to an alternative ground for noting probable jurisdiction, not made clear in appellant's Jurisdictional Statement—that review in this Court may be limited to the issue of the propriety of a single item of the relief decreed by the District Court. Resolution of this particular issue does not require this Court to

review, or the District Court to reconsider, the District Court's determination that Serta's exclusive territorial trademark-licensing system is unlawful because of its co-existence with illegal resale price maintenance. Appellant's principal concern on this appeal is not with this determination of illegality, but with the crippling effect on Serta's licensees of Section IV(D) of the Final Judgment, permanently enjoining their exclusive right to use the Serta trademarks in their designated areas. This injunction has the drastic effect of divesting each licensee of the goodwill which has been his chief competitive asset and which he has labored industriously and at great expense to develop.

In the instant case, no hearings were held as to the nature of the relief to be decreed, and no evidence was received concerning the purposes and effects of exclusive trademark licensing, which might have shed light on the question of the necessity for permanently enjoining that practice. However, the present record indicates that the prevention of price fixing can be effectively accomplished without the necessity for enjoining exclusive trademark rights for a designated territory. In particular, the record shows:

(a) Serta has whole-heartedly complied with the price fixing prohibitions of the Final Judgment and has undertaken ample measures to remove all vestiges of price fixing and prevent any recurrence (Item 250);

(b) Provisions of the Final Judgment itself, other than Section IV(D), furnish abundant protection against any resumption of price fixing. See the detailed and far-reaching injunctions and enforcement provisions contained in Section IV(a), (b), and (c) and Sections V and VI (Jurisdictional Statement, pp. 16a, 17a).

By its order of January 9, 1968 (Item 181), restricting the evidence to the single issue of the existence of retail price maintenance, the District Court foreclosed Serta from presenting any evidence showing the lack of connection between Serta's licensing of its trademarks for use in designated areas, on the one hand, and the fixing of retail prices, on the other. Also, there is in this case neither evidence nor a court finding that the territorial licensing of Serta's trademarks was "ancillary to price fixing", cf. *White Motor Co.* v. *United States*, 372 U.S. 253, 260, cited in *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 375—differentiating this case from *United States* v. *Sealy, Inc.*, 388 U.S. 350. Moreover, the evidence that was introduced shows that, for Serta, price fixing was not "an integral part of the whole distribution system", cf. *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 720; *United States* v. *Arnold, Schwinn & Co., supra;* Appendix C, Jurisdictional Statement, pp. 19a-20a.

In decreeing the divestiture of the Serta licensees' exclusive trademark rights and goodwill, the District Court ignored the rule laid down in *United States* v. *Bausch & Lomb Optical Co., supra,* at 728-9, that an otherwise lawful practice will not be permanently enjoined simply because of its co-existence with an illegal restraint, where such a permanent injunction is not necessary to eliminate the illegal restraint. In that case, which was cited several times in the *Schwinn* case (see pp. 373-7), the price-fixing activities were of an aggravated and pervasive nature and were "an integral part" of the entire distribution system. Two devices, the suggestions of resale prices and the use of resale price maintenance contracts under the Miller-

Tydings Act, had been used as a means of effectuating the illegal price-fixing system, and their use was therefore enjoined by the lower court, but only for a six-month period. The Government appealed to this Court, requesting that the decree be modified to make permanent the six-month injunctions. These requests were denied. The economic consequences of a permanent injunction against exclusive trademark licenses in the present case are far more serious to the Serta licensees than would have been the permanent injunctions with respect to price-fixing sought in *Bausch & Lomb*.

Fore the foregoing reasons Serta urgently requests that this case be remanded to the District Court for the purpose of affording Serta the opportunity of introducing evidence to show that price-fixing can be effectively prohibited and guarded against in the future, without the necessity for a permanent injunction divesting the Serta licensees of their exclusive trademark rights and their hard-won good will therein.

Respectfully submitted,

SIGMUND TIMBERG
815 15th Street, N.W.
Washington, D. C. 20005

ALAN J. ALTHEIMER
LIONEL G. GROSS
DAVID V. KAHN
ROGER B. HARRIS
One North LaSalle Street
Chicago, Illinois 60602

Attorneys for
SERTA ASSOCIATES, INC.

Certificate Under Rule 58

I, Sigmund Timberg, a member of the Bar of this Court, hereby certify, pursuant to Rule 58 of the Rules of the Supreme Court of the United States, that the foregoing Petition for Rehearing is presented in good faith and not for delay.

/s/ SIGMUND TIMBERG
Sigmund Timberg

Dated: March 20, 1969

SERTA ASSOCIATES, INC. *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 878. Decided February 24, 1969.

Affirmed.

Sigmund Timberg, Lionel G. Gross, and *David V. Kahn* for appellant.

Solicitor General Griswold, Acting Assistant Attorney General Hammond, and *William R. Weissman* for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART are of the opinion that probable jurisdiction should be noted and the case set for oral argument.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.